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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FIRST-CITIZENS BANK & TRUST CO.,

Plaintiff and Respondent,

v.

PHILLIPS P. YEE,

Defendant and Appellant.

A144754

(Alameda County
Super. Ct. No. RG12647373)

Following a bench trial, First-Citizens Bank & Trust Company (First-Citizens) recovered a judgment against Phillips P. Yee for breach of a commercial guarantee following the borrower's default on a real estate loan used to purchase a Nevada apartment complex. Yee appeals, arguing that Nevada law applies to preclude First-Citizens' recovery. We shall affirm the judgment upon concluding that recovery is proper under the law of either California or Nevada.

Statement of Facts and Trial Court Proceedings

Our statement of facts is drawn largely from the parties' statement of joint stipulated facts for court trial. Phillips P. Yee is a real estate investor domiciled in California. He owns multiple apartment units: 600 units in California and over 1,200 units in Nevada. In 2008, Yee's company, Heritage Giza, LLC (Heritage), purchased Pyramid Apartments, LLC, in Las Vegas, Nevada by assuming a \$29.7 million loan from First Regional Bank (FRB), a California commercial bank. Yee executed a personal guarantee of Heritage's payment obligations limited to 5 percent of the loan's outstanding principal. The guarantee was executed in California and includes a choice of law

provision: “This guaranty will be governed by federal law applicable to lender and, to the extent not preempted by federal law, the laws of the State of California without regard to its conflicts of law provisions.”

In 2010, FRB was closed by the California Department of Financial Institutions and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver. The FDIC sold the bulk of FRB’s assets, including the Heritage loan and Yee’s guarantee, to First-Citizens.

Heritage defaulted in July 2011. First-Citizens declared the entire balance due and, in February 2012, filed suit against Heritage in Nevada state court. In March 2012, First-Citizens filed this California action against Yee for breach of guarantee, seeking to recover \$1.43 million plus interest, costs and attorney fees. Meanwhile, the Nevada court appointed a receiver over Pyramid Apartments and, in September 2013, the receiver sold the apartment complex. The net proceeds of the sale, totaling close to \$13.3 million, were delivered to First-Citizens. Further proceedings in the Nevada action were stayed pending resolution of this California action.

Trial of this action began in July 2014. The parties stipulated to a bifurcated trial in which the court would first determine whether California or Nevada law governed the guarantee. Yee maintained that Nevada law controlled and invoked the protection of a Nevada statute restricting real property deficiency judgments by limiting a successor in interest’s recovery to the difference between the sale price of the foreclosed property and the amount the successor paid to acquire its interest.¹ Yee asserted that First-Citizens is barred from collecting on Yee’s guarantee because the bank recovered more from the sale of Pyramid Apartments than it paid the FDIC to acquire the loan.

The trial court determined that the enforceability of the guarantee is governed by California law, under which there is no such restriction. Following other determinations, the court entered judgment in favor of First-Citizens for \$1.9 million plus costs and attorney fees. Yee timely filed notice of appeal.

¹ The text of the statute is set out in the discussion section below.

Discussion

Yee raises numerous contentions on appeal, all founded on the premise that Nevada law applies to preclude First-Citizens' recovery. Yee maintains that Nevada law should be applied under general choice-of-law principles and by virtue of specific language in the guarantee excluding Yee's waiver of real property rights and defenses "[i]f any such waiver is determined to be contrary to any applicable law or public policy." Even if California law governs the contract, Yee argues, the waiver exclusion provision incorporates any law, which includes Nevada law. The application of Nevada law is doubtful given the contractual choice-of-law provision, California's substantial relationship to the parties and to this transaction, and California's interest in the enforcement of a guaranty executed and agreed to be performed here. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 916-917.) The short answer, however, is that Nevada law does *not* preclude First-Citizens' recovery and, thus, the guarantee is enforceable even if Nevada law is applied.

The parties agree that under California law Yee's guarantee is enforceable. Nevada law is the point of disagreement. "Nevada's anti-deficiency statutory scheme provides certain protections for guarantors. [Nevada Revised Statutes (NRS)] [s]ection 40.495 allows a creditor to bring an action separate from a foreclosure action against a guarantor to enforce 'that person's obligation to pay, satisfy or purchase all or part of an indebtedness or obligation secured by a mortgage or lien upon real property.' [Citation.] The statute further provides that '[i]f the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby, the guarantor . . . may assert any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to 40.4639, inclusive.' " (*Branch Banking & Trust Co. v. Iny* (D.Nev. Oct. 16, 2015, No. 2:11-cv-01777-MMD-VCF) 2015 U.S. Dist. Lexis 141090, p. *11.)

At issue here is the defense provided by NRS 40.459(1)(c) which, when the property was sold, limited the value a successor creditor could recover on a deficiency

judgment.² The statute then read, in relevant part: “[T]he court shall award a money judgment against the debtor, guarantor or surety who is personally liable for the debt. [However,] . . . [¶] (c) If the person seeking the judgment acquired the right to obtain the judgment from a person who previously held that right, [the court shall not render judgment for more than] the amount by which the amount of the consideration paid for that right exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs, whichever is the lesser amount.”

However, the defense provided by the Nevada statute does not apply to successor creditors who acquire interests from the FDIC, as did First-Citizens. (*Munoz v. Branch Banking & Trust Co.* (Nev. 2015) 348 P.3d 689, 690.) The Nevada Supreme Court held: “NRS 40.459(1)(c)’s application to failed banks’ assets held by the FDIC would limit the private market for such assets by making it more difficult for the FDIC to dispose of these assets. Thus, the application of NRS 40.459(1)(c) to assets transferred by the FDIC would frustrate the purpose of [the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)] and directly conflict with this federal statutory scheme. Consequently, NRS 40.459(1)(c) is preempted by FIRREA as to assets transferred by the FDIC and is without effect” where the creditor acquires a failed bank’s assets from the FDIC. (*Munoz*, at pp. 692-693.)

Yee argues that the Nevada Supreme Court’s preemption ruling is not binding on this court because it is based on an interpretation of federal law, not Nevada law. Even if not binding, the Nevada Supreme Court’s determination is persuasive. A federal district court adopted the Nevada high court’s reasoning in concluding that the Nevada statute is preempted by federal law and does not apply to FDIC assignees. (*Branch Banking &*

² NRS section 40.459 was amended in 2015 to exclude commercial properties like the property here. The statute now limits a successor creditor’s recovery for a deficiency judgment on a “property upon which the debtor, guarantor or surety maintains his or her principal residence.” (NRS, § 40.459(3)(c).) The narrowed statute applies only to loans made after June 11, 2011 and, thus, appears inapplicable here.

Trust Co. v. Rossal (D.Nev. 2015, Sept. 29, 2015, No. 2:12-cv-01298-MMD-GWF) 2015 U.S. Dist. Lexis 131363, pp. **7-12.) We agree. “Congress enacted the [FIRREA] . . . to enable the federal government to respond swiftly and effectively to the declining financial condition of the nation's banks and savings institutions.” (*Henderson v. Bank of New England* (9th Cir. 1993) 986 F.2d 319, 320.) The FDIC’s ability to arrange for a solvent bank to purchase the assets of a failed bank would be compromised if Nevada law were applied to restrict the amount an assignee may recover on a deficiency judgment to the amount the assignee paid for the asset less the amount of the secured property’s actual value. (*Munoz v. Branch Banking and Trust Co.*, *supra*, 348 P.3d at p. 692.)

Yee argues that the Nevada legislature’s intent to protect guarantors “deserve[s] full respect,” which requires application to FDIC assignees despite the Nevada Supreme Court holding. But when considering deference to the law of another state, we look at the law of the other state as applied in that state. There is no reason to apply a Nevada statute the Nevada courts will not apply.

Disposition

The judgment is affirmed. The parties’ requests for judicial notice are denied, as the proffered material is unnecessary to resolution of the issues on appeal.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.